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No. _____

In The
Supreme Court of the United States

PETER G. GRAIN, M.D., and ANNETTE BARNES, M.D.,
Petitioners,

v.

TRINITY HEALTH, MERCY HEALTH SERVICES, INC., d/b/a MERCY HOSPITAL-PORT HURON, and MARY R. TRIMMER,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a federal district court have the authority pursuant to *Wilko v. Swan*, 346 U.S. 427 (1953) overruled on other grounds, *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), to modify an arbitration award based upon the "manifest disregard of the law" standard when the arbitrators, in a restricted submission, do not apply the particular law for resolving the dispute specified by the parties in their pre-dispute arbitration agreement?

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Petitioners Peter G. Grain, M.D., and Annette Barnes, M.D., are individuals.

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The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *Grain v. Trinity Health, Mercy Health Services, Inc.*, 551 F.3d 374 (6th Cir. 2008). The Sixth Circuit affirmed the February 14, 2008 decision of the United States District Court for the Eastern District of Michigan, reported at 2008 WL 441060 (E.D. Mich. Feb 14, 2008). The District Court denied Petitioners' motion for reconsideration in an opinion and order on April 11, 2008. See Appendices A-C.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the decision of the district court's order denying Petitioners' motion to correct or modify the arbitration award was issued on December 24, 2008. A timely petition for a rehearing en banc was denied by the Sixth Circuit on February 25, 2009. See Appendix D. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Federal Arbitration Act, 9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or

> refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Federal Arbitration Act, 9 U.S.C. § 11:

> In either of the following cases the United States court in and for the district wherein the award was made may make an offer modifying or correcting the award upon the application of any party to the arbitration –
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

The present case involves an important issue regarding the nature and scope of judicial review of an

arbitration award in a "restricted submission" arising under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*. The submission was restricted by the parties' arbitration agreement providing that the dispute "shall be governed by the laws of the State of Michigan." (J.A. 65). The arbitration agreement also provided that "[t]he prevailing party shall be awarded his/its costs including actual attorney fees . . ." (J.A. 61). At the close of the arbitration proceedings, the Panel determined that Petitioner Dr. Peter Grain, an African-American neurosurgeon, was the prevailing party. Notwithstanding, in calculating the costs, attorney fees and interest awarded to Dr. Grain, the Arbitration Panel, exceeding its authority under the parties' arbitration agreement, did not apply the well-established Michigan law of contract damages. Accordingly, Petitioners moved the District Court to correct or modify the Arbitration Award in this respect on the basis that the Arbitration Panel manifestly disregarded controlling Michigan law.

The District Court, however, denied Petitioners' motion to correct or modify the Award as to the costs, attorney fees and interest awarded to Dr. Grain. In pertinent part, the District Court found "manifest disregard of the law" may only be "a basis for *vacating* an arbitration award," not for the modification of an arbitration award. (Appendix B, 16a). In denying Petitioners' motion for reconsideration, the District Court also stated that, pursuant to Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11 [of the FAA]." (Appendix C, 23a) (citing *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995)) (emphasis in original). Agreeing with the District Court, the Sixth Circuit affirmed the order, holding

that "*NCR* remains the law of this circuit and prohibits modifying an award based on an alleged 'manifest disregard' of law." (Appendix A, 11a). The Sixth Circuit denied Petitioners' petition for en banc rehearing on February 25, 2009. (Appendix D).

The Sixth Circuit's decision undermines the parties' autonomous common-law contractual rights to determine the law binding the Panel concerning the resolution of their dispute through the arbitration process. Specifically, it is contrary to *Wilko v. Swan,* 346 U.S. 427 (1953), overruled on other grounds by *Rodriguez de Quijas v. Shearson/American Express Inc.,* 490 U.S. 477 (1989), and longstanding case law subsisting alongside the FAA, which has recognized judicial review of arbitration awards under the manifest disregard of the law standard. The Sixth Circuit's decision also creates a split with other circuits, particularly the Second Circuit, which recognizes the manifest disregard of the law standard as a proper ground for modifying an arbitral award.

I. The Arbitration Proceedings

This case arises from Respondent Mercy Hospital's breach of an Income Guarantee Agreement ("IGA") with Petitioner Dr. Peter Grain in June 1998 (at the earliest) or January 28, 1999 (at the latest), and Respondents' wrongful conduct in compelling Dr. Grain to sign a Release rescinding the IGA.[1] The

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[1] As stated by the District Court in its August 11, 2004 opinion, Respondent Mercy recruited Dr. Grain to its service area in Port Huron, Michigan, and the parties entered into an IGA with an arbitration provision. (J.A. 153). Subsequently, Respondents threatened not to renew Dr. Grain's hospital privileges, which

parties' arbitration agreement is set forth at Paragraph 4 of the IGA, which provides in pertinent part:

> 4. Dispute Resolution. Any disputes involving the interpretation, breach or enforcement of this Agreement which cannot be resolved by the Hospital and Physician shall be resolved by binding arbitration in accordance with the rules of the American Arbitration Association. The prevailing party shall be awarded his/its costs including actual attorney fees. . . . (J.A. 61)

Paragraph 13 of the IGA specifies the law governing the IGA:

> 13. Governing Law. The validity and interpretation of the Agreement shall be governed by the laws of the State of Michigan. (J.A. 65)

In an order issued on August 11, 2004, the District Court granted Respondents' motion to compel arbitration of the parties' dispute. (J.A. 106-111). The Demand for Arbitration was filed on October 28, 2004. The arbitration proceedings commenced on September 11, 2006 and concluded on May 24, 2007 after forty-five hearing days. On December 22, 2007, the Panel entered an Award against the Respondents, jointly and

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would have effectively ended his career as a neurosurgeon, if he did not sign a Release. (J.A. 153). Confronted with this pressure, Dr. Grain signed a Release on February 2, 1999, and his privileges were extended. (J.A. 153-154). On June 26, 2003, Petitioners filed a sixteen-count Verified Complaint, including a race discrimination under 42 U.S.C. § 1981. (J.A. 18-56).

severally. (J.A. 194-231). Specifically, the Panel found that (i) the Respondents forced Dr. Grain to sign the Release under duress, and (ii) that their conduct was overreaching and wrongful. Accordingly, the Panel rescinded the Release and awarded Dr. Grain damages for Respondent Mercy Hospital's breach of contract in the amount of $518,625, attorneys' fees of $1,145,294.35, costs of $490,476.20, less Respondents' attorneys' fees and costs of $512,525.11 for a net Award of $1,641,870.44, plus interest on the contract damages from October 28, 2004, the date of the Demand for Arbitration. The Panel rejected Dr. Grain's claims of misrepresentation and civil extortion.

II. The Panel's Determination Of The Costs, Attorney Fees And Interest Awarded To Dr. Grain As The Prevailing Party In The Arbitration Proceedings Was Manifestly Contrary To Well-Established Michigan Statutory And Case Law.

Although the Panel found that Respondents' wrongful conduct interfered with Dr. Grain's contract with Mercy Hospital and that Mercy Hospital breached the contract with Dr. Grain, the Panel manifestly disregarded applicable Michigan statutory and case law in three ways when calculating the costs, attorneys' fees and interest awarded to Dr. Grain.

First, the Panel manifestly disregarded well-settled Michigan law of damages when it awarded interest on Dr. Grain's contract damages in the amount of $518,625.00 only from the date of the Demand for Arbitration (October 28, 2004) until the satisfaction of the judgment (January 30, 2008). (J.A. 214-216). As a result, the Panel did not award any interest on the

contract damages portion of the Arbitration Award for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).[2] Pursuant to clearly established Michigan law of damages, the Panel was required to calculate interest on Dr. Grain's contract damages in the amount of $518,625.00 for the "gap period" running from the date of the breach of contract (June 1998 or January 28, 1999) until the date of the Demand for Arbitration (October 28, 2004).

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[2] Michigan recognizes a distinction between (1) common-law or judicially-determined interest as an element of damages and (2) statutorily determined interest on a money judgment in a civil action. *Gordon Sel-Way, Inc. v. Spence Bros.*, 475 N.W.2d 704, 711 n. 9 (Mich. 1991). Both forms of interest are intended to compensate the plaintiff for loss of the use of funds. Common-law or judicially determined interest is considered an element of damages, awardable in contract actions from the date of the breach. *McCreery v. Green*, 38 Mich. 172, 185 (1878); *Snow v. Nowlin*, 5 N.W. 443, 445 (Mich. 1880); Hon. P. McMillen, 2 *Michigan Law of Damages and Other Remedies* (3rd ed.) (ICLE, 2008), *Interest*, § 28.8. Michigan also recognizes a statutory form of interest on a money judgment. Specifically, Michigan Compiled Laws (M.C.L.) § 600.6013 provides for interest on a "money judgment recovered in a civil action." Accordingly, common-law interest on the contract damages awarded to Dr. Grain had to be calculated from the date that Mercy Hospital breached the IGA with Dr. Grain (either June 1998 or January 28, 1999) until the date the Arbitration Award was satisfied (January 30, 2008). The Panel was also required by the judgment interest statute to calculate interest from the date the complaint was filed (June 26, 2003) until the satisfaction of the judgment. See *R.D. Mgmt. Corp. v. Philadelphia Indem. Ins. Co.*, 302 F.Supp.2d 728, 737-38 (E.D. Mich. 2004).

Second, because clear and controlling Michigan law (statutory, case law and public policy) treats costs and attorneys' fees as contract damages, the Panel was required to calculate the interest on costs and attorneys' fees in the amount of $1,635,770.55 running from the date of the breach of contract (June 1998 or January 28, 1999) until the satisfaction of the judgment.[3] However, the Panel manifestly disregarded Michigan law and public policy in this respect when it did not award any interest on Dr. Grain's costs and attorneys' fees from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

Third, under well-established Michigan contract law, Dr. Grain was the "prevailing party" in the arbitration proceedings.[4] Consequently, Dr. Grain was

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[3] Under Michigan law, attorney fees are recoverable as an element of damages if provided for by contract. *Nemeth v. Abonmarche Dev., Inc.*, 576 N.W.2d 641, 652 n. 13 (Mich. 1998). Attorney fees awardable under a contractual provision are considered damages, not costs. *Fleet Bus. Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*, 735 N.W.2d 644, 647 (Mich. Ct. App. 2007); M. Kalmink, 2 *Michigan Law of Damages and Other Remedies* (3rd ed) (ICLE, 2008), *Attorney Fees*, § 29.2. In addition, under M.C.L. 600.6013(1)-(8), interest is awardable on costs and attorney fees as an element of contract damages. See *Everett v. Nikola*, 599 N.W.2d 732, 735-736 (Mich. Ct. App. 1999).

[4] Pursuant to the plain and ordinary meaning of "prevailing party" as found in the contract, the Panel was compelled by controlling Michigan law to award Dr. Grain all his costs and actual attorneys' fees as the prevailing party in the arbitration proceedings. See *Forest City Enters., Inc. v. Leemon Oil Co.*, 577 N.W.2d 150, 161-162 (Mich. Ct. App. 1998); *H.J. Tucker & Assocs., Inc. v. Allied Chucker and Eng'g Co*, 595 N.W.2d 176, 182 (Mich. Ct. App. 1999) (quoting *Van Zanten v. H. Vander Laan Co., Inc.*,

entitled to all his costs and actual attorneys' fees, as provided by the plain and unambiguous language of Paragraph 4 of the IGA.[5] Moreover, the Panel manifestly disregarded Michigan law and public policy by ruling that Dr. Grain was only entitled to 75% of his costs and attorneys' fees and that he was responsible for 25% of Respondents' costs and attorneys' fees. (J.A. 214-216).[6] Consequently, the

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503 N.W.2d 713, 714 (Mich. Ct. App. 1993)); see also *South Davison Cmty. Center, Inc. v. Township of Davison*, No. 232346, 2002 WL 31421770, at *4 n. 6 (Mich. Ct. App. Oct. 25, 2002) (noting that "[t]he United States Supreme Court recently defined a 'prevailing party' as one who has received a favorable judgment on the merits of his claim or an enforceable consent judgment; either of which create the necessary 'material alteration of the parties' legal relationship'") (quoting *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't. of Health & Human Res.*, 532 U.S. 598, 603-604 (2001)).

[5] The Panel paid no heed to the clear and unambiguous language of the contractual provision that "[t]he prevailing party" is entitled to his/its actual attorneys' fees when it found that Dr. Grain was not entitled to his "actual attorney fees" on the ground that his attorneys' fees were "excessive." The Panel based this clearly erroneous ruling upon Michigan Rule of Professional Conduct (M.R.P.C.) 1.5 presumably on the ground that his attorneys' fees were "in excess of a 'reasonable fee.'"(J.A. 210). M.R.P.C. 1.5, however, does not apply when there is a contractual provision that clearly and unambiguously provides for the recovery of "actual attorney fees." See *Cargas v. Bednarsh*, No. 239421, 2003 WL 21716463, at *1 (Mich. Ct. App. July 24, 2003) (citing *Mahnick v. Bell Co*, 662 N.W.2d 830, 832-833 (Mich. Ct. App. 2003)).

[6] The Panel found that Dr. Grain failed to prevail on his misrepresentation claim, which the Panel concluded was unrelated to his claims of rescission and breach of contract. (J.A. 155-163). As a result, the Panel reduced Dr. Grain's award of his costs and attorneys' fees by 25% and charged him with 25% of

Panel manifestly erred by subtracting $545,256.00 in costs and attorneys' fees from Dr. Grain's total damages award; by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $545,256.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment; by requiring Dr. Grain to pay Respondents' costs and attorneys' fees in the amount of $512,525; and by failing to calculate interest on the costs and attorneys' fees as contract damages in the amount of $512,525.00 running from the date of the breach of contract and/or the date of the filing of the complaint until the satisfaction of the judgment.

III. The District Court Denied Petitioners' Motion To Modify The Award On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In response to the Panel's manifest disregard of the law in calculating the Award with respect to the costs, attorney fees and interest awarded to Dr. Grain as the

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Respondents' costs and attorneys' fees. There was, however, no rational basis in Michigan law for the Panel to award Dr. Grain only 75% of his costs and attorneys' fees and make him responsible for 25% of Respondents' costs and attorneys' fees when he was prevailing party in the arbitration proceedings. Moreover, as a matter of collateral estoppel and/or res judicata, the Panel was bound by the District Court's determination that Dr. Grain's misrepresentation claim arose out of the same core of facts as his claims for rescission and breach of contract. *Aircraft Braking Sys. Corp. v. Local 856, Int'l Union, United Auto., Aerospace & Agric. Implement Workers, UAW*, 97 F.3d 155, 160-161 (6th Cir. 1996).

prevailing party in the arbitration proceeding, Petitioners moved the District Court on December 22, 2007 to confirm the Panel's decision on liability and contract damages, but to correct or modify the Award as to the calculation of the costs, attorneys' fees and interest due to Dr. Grain. (J.A. 172-231). On February 14, 2008, the District Court issued an opinion and order granting Petitioners' motion to confirm the Award as to damages and liability, but denying Petitioners' motion to modify the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain. (Appendix B). In pertinent part, the District Court reasoned that it had no authority to modify an award for a "manifest disregard of the law," and that it could only vacate the award under that standard. (Appendix B, 16a-17a).

Petitioners then moved the District Court under Fed. R. Civ. P. 59(e) to reconsider its decision on the grounds that case law of the Sixth Circuit, and other federal case law, allows for the modification of an arbitration award for "manifest disregard of the law." (J.A. 417-686). On April 11, 2008, the District Court entered an opinion and order denying Petitioners' motion for reconsideration. (Appendix C). In pertinent part, the District Court observed that, under Sixth Circuit precedent, "[a] court's power to *modify* an arbitration award *is confined to* the grounds specified in § 11." (Appendix C, 23a)(citing *NCR Corp., supra.*, 43 F.3d at 1080) (second emphasis added in original).

IV. The Sixth Circuit Affirmed The District Court's Order On The Ground That The Manifest Disregard Of The Law Standard Does Not Apply To Modify An Arbitration Award.

In an opinion issued for publication on December 24, 2008, the Sixth Circuit affirmed the District Court's order denying Petitioners' motion to adjust the Award as to the costs, attorneys' fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. (Appendix A). In pertinent part, the Sixth Circuit held that its decision in *NCR Corp.* "remains the law of this circuit and prohibits modifying an [arbitration] award based on an alleged 'manifest disregard' of law." (Appendix A, 11a).

REASONS FOR GRANTING THE PETITION

Whether a federal district court may modify an arbitration award based upon the "manifest disregard of the law" standard when arbitrators set aside the parties' pre-dispute arbitration agreement requiring the application of a particular law is a question of paramount importance arising under the FAA, 9 U.S.C. § 1 *et seq*. It is a question that was left open by this Court's decision in *Hall Street Assoc., L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). In rejecting the parties' post-dispute arbitration agreement in that case providing for "a private expansion by contract" of the statutory grounds set forth in the FAA for the vacation or modification of an arbitration award, *Hall Street* did not address whether an arbitration award, in a submission restricted by a pre-dispute arbitration agreement mandating the application of a particular law, may be modified on the basis of the manifest

disregard of the law or the nature and scope of that standard. Thus, this Court's guidance is urgently needed on this issue since the circuit courts are deeply split as to whether a court may modify an arbitration award based upon the manifest disregard of the law standard. Further, in view of the increasing importance of arbitration as a preferred mode of dispute resolution in this country, as recently reflected by this Court's decision in *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), it is jurisprudentially necessary to subject arbitration awards to judicial review under the manifest disregard of the law standard in order to ensure the protection of important rights, particularly federal civil rights, in the arbitral forum.

In concluding that § 10 and § 11 of the FAA provide the exclusive regime for judicial review of an arbitration award, the majority in *Hall Street* acknowledged that "the FAA is not the only way into court for parties wanting review of arbitration awards." 128 S. Ct. at 1406. Among the non-statutory ways, the majority in *Hall Street* indicated that parties may seek judicial review based upon their common-law rights under contract law. The present case seeks review upon this ground. Specifically, Petitioners contend that, apart from statutory criteria specified at § 11 of the FAA, a court may modify an arbitration award for the manifest disregard of the law when arbitrators in a "restricted submission" defy the express terms of the parties' pre-dispute arbitration agreement mandating the application of the state law governing their dispute.

I. REVIEW IS NECESSARY TO ENFORCE THE PARTIES' COMMON-LAW CONTRACTUAL RIGHTS TO ARBITRATE THEIR DISPUTE IN ACCORDANCE WITH WELL-ESTABLISHED MICHIGAN LAW, SUBJECT TO JUDICIAL REVIEW BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

At the root of this action is the common-law principle of party autonomy to enter into an agreement to determine the legal rules governing the resolution of a dispute through arbitration.[7] From this principle flows the legal consequence that the parties' agreement in the present action to arbitrate their dispute in accordance with well-settled Michigan law is subject to judicial review under the manifest disregard of the law standard.

Section 2 of the FAA provides that a written agreement to arbitrate any contract involving interstate commerce or a maritime transaction "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The "preeminent concern" of Congress in enacting the FAA was "the enforcement . . . of privately negotiated arbitration agreements." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219, 221 (1985). It was to place such

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[7] See Kirgis, *The Contractarian Model of Arbitration and its Implications for Judicial Review of Arbitral Awards*, 85 Or. L. Rev. 1 (2006); Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 Duke L.J. 547 (2005); Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 Tul. L. Rev. 39 (1999); Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn. L. Rev. 703 (1999).

agreements "upon the same footing as other contracts." *Volt Info. Sciences, Inc. v. Bd. of Trs. of the Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1980)(quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)(quoting H.R. Rep. No. 96, 68th Cong., Ist Sess., 1, 2 (1924)); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the federal policy is to ensure the enforcement of parties' private agreements to arbitrate in accordance with the terms of these agreements. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (noting that "as with any other contract, the parties' intentions control"); *Volt, supra*. 489 U.S. at 478 ("It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.").

A. The Panel Was Bound By The Parties' Arbitration Agreement To Calculate The Costs, Attorney Fees And Interest Awarded To Dr. Grain In Accordance With Well-Established Michigan Law.

Because arbitration is strictly a matter of contract, parties to an arbitration agreement are at liberty to choose the particular substantive law that governs the resolution of their dispute. *Mastrobuono v. Shearson Lehnman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (noting that "parties are generally free to structure their arbitration agreements as they see fit") (quoting *Volt, supra.*, 489 U.S. at 479). In light of the broad purpose of the FAA to enforce arbitration agreements as written, it thus defies the legitimate expectations of the parties if arbitrators decide a dispute in a manner that egregiously departs from the established legal principles agreed upon by the parties to govern their

dispute. Based upon this principle, the parties to the present action should not be bound by the Panel's manifestly erroneous rulings that clearly depart from well-established principles of Michigan law governing their dispute, and the Award should be modified accordingly.[8]

In this case, under the IGA, the parties agreed that any contractual dispute "***shall*** be governed by the laws of the State of Michigan." (J.A. 65) (emphasis added). Notwithstanding the clear terms of the parties' contract, the Panel set aside the parties' bargained-for expectations to resolve their dispute in accordance with well-settled Michigan law of contract damages when it calculated the costs, attorney fees and interest awarded to Dr. Grain as the prevailing party in the arbitration proceedings. Exceeding the powers provided by the parties' arbitration agreement, the Panel calculated the costs, attorney fees and interest in accordance with its own unknown version of the law. However, as a matter of the common-law of contracts and agency, the Panel was not free to determine the dispute between the parties without applying the well-established Michigan law of contract damages in calculating the costs, attorney fees and

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[8] As indicated by its history and structure, the FAA was intended to enforce party autonomy by effectuating private agreements to arbitrate. However, the paramount interests of private autonomy and the public interest in fostering private agreements to arbitrate are thwarted when arbitrators are allowed to operate arbitrarily and capriciously, unchecked by judicial review. Thus, judicial review of arbitration agreements under the manifest disregard of the law standard is vital to ensure that arbitrators effectuate the parties' contractual agreement to arbitrate based upon the parties' own terms.

interest awarded to Dr. Grain.[9] Consequently, the Panel's decision in this respect should not bind the parties, nor be enforceable under § 2 of the FAA.

B. The Manifest Disregard Of The Law Standard Stated In *Wilko* Reflects Longstanding Common Law Predating The Enactment Of The FAA.

In *Wilko*, *supra.*, 346 U.S. at 436-437, this Court introduced the "manifest disregard" language against a backdrop of well-established arbitration law and practice. See also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (reaffirming the existence of the manifest disregard test).[10] Specifically, in *Wilko*, this Court stated: "in ***unrestricted*** submission, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in federal courts, to judicial review for

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[9] See *George Watts & Son, Inc. v. Tiffany and Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (citing *Eastern Associated Coal v. United Mine Workers*, 531 U.S. 57, 62 (2000); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Ind. Ass'n of E. Chicago, Inc.*, 790 F.2d 611, 619 (7th Cir. 1986) (Easterbrook, J. concurring); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 Mich. L. Rev. 1137, 1140 (1977).

[10] For a lucid analysis of the federal and state case law pre-existing the enactment of the FAA and the *Wilko* decision, see Gaitis, *Unraveling the mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy*, 7 Pepp. Disp. Resol. L.J. 1 (2007).

error in interpretation."(Emphasis added.)[11] Under *Wilko*, then, the manifest disregard of the law standard applies with even greater force in a ***restricted*** submission requiring the application of a particular law as mandated by the parties' arbitration agreement.[12] Thus, when an arbitration proceeding is governed by a "restricted submission" mandating that arbitrators apply a particular law, the resulting arbitration award should be subject to modification by

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[11] Footnote 24 in *Wilko* attached to this passage cites to *Burchell v. Marsh*, 58 U.S. 344 (1854), *United States v. Farragut*, 89 U.S. 406 (1874), *Kleine v. Catara*, 14 F.Cas. 732 (1814), *Texas & P. Ry. Co. v. St. Louis Southwestern Ry. Co.*, 158 F.2d 251, 256 (8th Cir. 1946); *The Hartbridge (North England S.S. Co. v. Munson S.S. Line)*, 62 F.2d 72, 73 (2d Cir. 1932), *Mutual Benefit Health & Health & Acc. Ass'n v. United Cas. C.*, 142 F.2d 390, 393 (1st Cir. 1944), and Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 681, 685 (1950).

[12] Under *Wilko* and predecessor case law, submissions to arbitrators may be restricted or unrestricted. As explained by Justice Story in *Kleine, supra.*, 14 F.Cas. at 735:

> If the parties wish to reserve the law for the decision of the court, they may stipulate to that effect in the submission; they may restrain or enlarge its operation as they please. If no such reservation is made in the submission, the parties are presumed to agree, that every thing, both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

Unlike an unrestricted submission, a restricted submission limits the arbitrators' authority in some respect.

a reviewing court for a manifest disregard of the law when the arbitrators clearly fail to apply that law.[13]

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[13] *Wilko* and the predecessor case law effectively stand for the proposition that when a submission is restricted by the parties' arbitration agreement so as to compel arbitrators to apply a particular law in resolving the dispute, the parties are contractually entitled to have the chosen law so applied, and the arbitrators are obligated to apply the law in that manner. Further, this Court's formulation of the manifest disregard of the law standard in *Wilko* subsists alongside the FAA. See McNeil, *American Arbitration Law* at 104 (1992) ("Sections [10 and 11] constitute limitations on the basic principle enunciated in section 2 in the form of specified grounds for vacation and modification of arbitral awards. They do not, however, constitute a significant departure from common law or statutory arbitration as it existed before modern arbitration statutes."). Thus, at § 11, the FAA states: "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties." Finally, there is no indication that the Congress, in enacting the FAA, intended to displace the common-law basis for reviewing an arbitration award in a restricted submission based upon a manifest mistake or error in the application of the law governing the parties' dispute. See *City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 315, n. 8 (1981) ("[T]he question whether a previously available federal common-law action has been displaced by federal statutory law involves an assessment of the scope of the legislation and whether the scheme established by Congress addresses the problem formerly governed by federal common law"). See also Gaitis, *supra*. note 10, at 57-58; Poser, *Judicial Review of Arbitration Awards: Manifest Disregard of the Law*, 64 Brook. L. Rev. 471, 518 (1998).

II. REVIEW IS WARRANTED TO RESOLVE A CIRCUIT CONFLICT CONCERNING THE MODIFICATION OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD.

A. The Sixth Circuit Inconsistently Applies The Manifest Disregard Of The Law Standard To Vacate But Not Modify Arbitration Awards.

In accord with virtually every circuit court, the Sixth Circuit has recognized the manifest disregard of the law standard as a non-statutory ground for vacating arbitration awards.[14] Specifically, in *Merrill Lynch, Pierce, Fenner & Smith, Inc., v. Jaros,* 70 F.3d 418, 421 (6th Cir. 1995), the Sixth Circuit, relying upon *Wilko*, found that arbitrators manifestly disregard the law if "(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2)

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[14] With one exception, every circuit court has followed *Wilko* by recognizing some version of the "manifest disregard of the law" standard. *See Prudential-Bache Sec., Inc. v. Tanner,* 72 F.3d 234 (1st Cir. 1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.,* 103 F.3d 9 (2d Cir. 1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.,* 51 F.3d 376 (3d Cir. 1995); *Upshur Coals Corp. v. United Mine Workers of Am., Dist. 31,* 933 F.2d 225 (4th Cir.1991); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395-396 (5th Cir. 2003); *Lee v. Chica,* 983 F.2d 883 (8th Cir. 1993); *Barnes v. Logan,* 122 F.3d 820 (9th Cir. 1997); *Jenkins v. Prudential-Bache Sec., Inc.,* 847 F.2d 631 (10th Cir. 1988); *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456 (11th Cir. 1997); *Kanuth v. Prescott, Ball & Turben, Inc.*, 949 F.2d 1175 (D.C. Cir. 1991). The only exception is the Seventh Circuit. See *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

the arbitrators refused to heed that legal principle."[15] While the Sixth Circuit recognizes that the manifest disregard of the law standard applies to vacate an arbitration award, it nonetheless denies that arbitration awards may be modified on this ground. In so doing, the Sixth Circuit offers no principled basis for this demarcation, simply declaring in *NCR Corp.* that "[a] court's power to *modify* an arbitration award is confined to the grounds specified in § 11." 43 F.3d at 1080 (emphasis in original).[16]

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[15] In *Jaros*, the Sixth Circuit made it abundantly clear that "a blatant disregard of the applicable rule of law will not be tolerated." *Id.* at 421; see also *Dewahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000) ("Thus, to find manifest disregard a court must find two things: the relevant law must be clearly defined and the arbitrator must have consciously chosen not to apply it.").

[16] Petitioners contend that judicial review of arbitration awards based upon the manifest disregard of the law standard is not an all or nothing affair under the FAA. Indeed, the manifest disregard of the law standard logically applies to the modification of an arbitration award, which is nothing more than the partial vacation of an award. Even the Sixth Circuit in *NCR Corp.* recognizes this point, noting that "[v]acating an award "in-part" . . . is synonymous with modifying an award." *Id.* at 1080. Thus, pursuant to the principle that the greater power contains the lesser, *NCR Corp.* warrants the conclusion that the modification of an arbitral award should be subject to judicial review under the manifest disregard of the law standard, See *O'Connell v. Shalala*, 79 F.3d 170, 177 (1st Cir. 1996) (citing *United States v. O'Neil*, 11 F.3d 292, 296 (1st Cir. 1993)) (describing this principle as "a bit of common sense that has been recognized in virtually every legal code from time immemorial").

B. The Second Circuit Recognizes The Manifest Disregard Of The Law Standard As A Non-Statutory Basis For Modifying Arbitration Awards.

The Sixth Circuit's decision also creates an unnecessary circuit split since the leading circuit court reviewing arbitration awards – the Second Circuit – recognizes the manifest disregard of the law as a judicially-created ground for modifying an arbitration award. See *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997); *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202 (2d Cir. 1998). This circuit split occurs despite the fact that both the Sixth Circuit and Second Circuit define the manifest disregard of the law standard in similar terms.[17]

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[17] In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986), the Second Circuit, relying upon *Wilko*, defined the manifest disregard of the law standard as follows:

> The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it. . . . To adopt a less strict standard of judicial review would be to undermine our well established deference to arbitration as a favored method of settling disputes when agreed to by the parties. Judicial inquiry under the "manifest disregard" standard is therefore extremely limited. The governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable. We are not at liberty to set aside an Panel's award because of an arguable difference regarding the meaning or applicability of laws urged upon it.

III. REVIEW IS NEEDED BECAUSE THIS CASE IS THE PERFECT VEHICLE TO RECOGNIZE JUDICIAL REVIEW OF ARBITRATION AWARDS BASED UPON THE MANIFEST DISREGARD OF THE LAW STANDARD AS CONSISTENT WITH THE NATIONAL POLICY FAVORING ARBITRATION.

Judicial review of the arbitration award in this case based upon the Panel's manifest disregard of the law is fully consistent with the national policy favoring arbitration since it is necessary to preserve the parties' contractual expectations to have their dispute decided in accordance with the particular law that the parties themselves have chosen. *Hall Street, supra.*, 128 S. Ct. at 1405. Moreover, in seeking to modify the Award, Petitioners are not asking this Court to "open[] the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process . . . and bring arbitration theory to grief in the post-arbitration process." *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Serv.*, 341 F.3d 987, 998 (9th Cir. 2003)). Because the proper adjustments in the Award will not engender a cumbersome or time-consuming process, reversal of the Sixth Circuit's decision affirming the District Court's order denying Petitioners' motion to modify the Award on the basis of the Panel's manifest disregard of Michigan law is

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At least one other circuit court has explicitly recognized the manifest disregard of the law standard applies to the modification of an arbitration award. See *LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 706 (D.C. Cir. 2001).

fully consistent with the current "national policy favoring arbitration with . . . limited review." *Hall Street, supra.*, 128 S. Ct. at 1405.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1410

[Filed December 24, 2008]

PETER G. GRAIN, M.D., and ANNETTE BARNES, M.D., *Plaintiffs-Appellants*,	)
v.	)
TRINITY HEALTH, MERCY HEALTH SERVICES INC., d/b/a Mercy Hospital, and MARY R. TRIMMER, *Defendants-Appellees*.	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 03-72486—Patrick J. Duggan, District Judge.

Submitted: December 12, 2008

Decided and Filed: December 24, 2008

Before: ROGERS, SUTTON and McKEAGUE, Circuit Judges.

COUNSEL

ON BRIEF: Elmer L. Roller, LAW OFFICE OF ELMER L. ROLLER, Bloomfield Hills, Michigan, Gary P. Supanich, LAW OFFICE, Ann Arbor, Michigan, for Appellants. W. Mack Faison, Richard Joseph Seryak, MILLER, CANFIELD, PADDOCK & STONE, Detroit, Michigan, Linda O. Goldberg, MILLER, CANFIELD, PADDOCK & STONE, Ann Arbor, Michigan, for Appellees.

OPINION

SUTTON, Circuit Judge. Peter Grain and Annette Barnes challenge the district court's denial of their motion to confirm in part and modify in part a $1.6 million arbitration award. We affirm.

I.

Grain and Barnes, husband and wife, are medical doctors who once worked for Mercy Hospital. In 2003, they sued Mercy and the related defendants for taking a variety of "punitive actions" that allegedly interfered with their medical practices. JA 41. Grain complained that the defendants had violated 42 U.S.C. § 1981 by discriminating on the basis of race in contracting and by violating several state laws, while Barnes sought only state-law relief. After the defendants moved to compel arbitration, the district court dismissed the state-law claims that were subject to a pre-existing arbitration agreement and stayed the remaining claims pending arbitration.

Grain and Barnes prevailed in the arbitration proceeding and won $1,641,870.44. They then filed a

motion in the district court, asking the court to confirm the merits of the arbitration decision and to increase the size of the award. The district court confirmed the award but refused to increase it. *Grain v. Trinity Health* (*Grain I*), No. 03-72486, 2008 WL 441060, at *3 (E.D. Mich. Feb. 14, 2008). After a failed motion to reconsider, *see Grain v. Trinity Health* (*Grain II*), No. 03-72486, 2008 WL 1742718, at *3 (E.D. Mich. April 11, 2008), Grain and Barnes appealed.

II.

The parties agree that we have jurisdiction over this appeal. But because the parties to a lawsuit cannot by consent create appellate jurisdiction that does not otherwise exist, we must determine for ourselves whether we have authority to resolve this appeal. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

The traditional ground for appellate jurisdiction—the final-judgment rule, 28 U.S.C. § 1291—does not give us authority to decide this appeal. Although the district court has done everything that can be done with respect to the arbitration and although it dismissed the other claims subject to the arbitration agreement, it retains jurisdiction over, and indeed continues to consider, the non-arbitrable claims filed by Grain and Barnes. Section 1291 generally does not permit piecemeal appeals but only permits an appeal once there is nothing left to do but enter the judgment and enforce it. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Nor do the general exceptions to the final-judgment rule appear to apply here. The district court did not enter a Rule-54(b) certification,

which permits a court to "dispose[] of one or more but fewer than all of the claims or parties in a multi-claim/multi-party action," *Brotherton v. Cleveland*, 173 F.3d 552, 559 (6th Cir. 1999) (emphasis omitted), and which at any rate may not apply to interlocutory arbitration decisions, *see Perera v. Siegel Trading Co.*, 951 F.2d 780, 786 (7th Cir. 1992). No party relies on § 1292(b) as a basis for jurisdiction. And the collateral-order doctrine—which is frequently invoked but rarely invoked successfully, *see, e.g.*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)—does not apply because the propriety of the district court's confirmation order would not be "effectively unreviewable on appeal from a final judgment" after the remaining matters are resolved below. *United States v. Parrett*, 530 F.3d 422, 427 (6th Cir. 2008).

All of these rules, however, deal with general grounds for declining to adhere to the final-judgment rule established by § 1291. They do not preclude Congress from granting specific jurisdiction over appeals arising under certain federal laws, even appeals that do not resolve the rest of the claims pending in the district court. *See Livesay*, 437 U.S. at 474; *Moglia v. P. Employees Ins.* Co., 547 F.3d 835, 837 (7th Cir. 2008); see *also In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983); *accord* 16 Wright, Miller & Cooper, *Fed. Prac. & Proc.* § 3926.2. *See generally* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. Pitt. L. Rev. 717, 729–36 (1993) (collecting statutory exceptions to the final-judgment rule of § 1291).

One such grant of specific appellate jurisdiction appears in the Federal Arbitration Act. *See Omni Tech Corp. v. MPC Solutions Sales, LLC*, 432 F.3d 797, 799 (7th Cir. 2005). Congress has empowered the courts of appeals to entertain a variety of appeals from interlocutory and final district-court arbitration decisions, including "[a]n appeal . . . from . . . an order . . . confirming . . . an award." 9 U.S.C. § 16(a)(1)(D). This appeal falls within this grant of appellate authority.

Grain and Barnes filed this action under the Federal Arbitration Act, seeking to confirm the arbitrators' decision in part (by upholding their liability ruling) and seeking to modify the arbitrators' decision in part (by increasing the award from $1.6 million to roughly $3.2 million). Although the Act permits a district court to grant both forms of relief, 9 U.S.C. §§ 9, 10, the court in this instance granted just one of them: It granted the couple's request to confirm the liability ruling but denied their request to modify the damages award. All of this resulted in a district-court order "confirming . . . an award," which is precisely what § 16(a)(1)(D) permits a disappointed party, even a *partly* disappointed party, to appeal. Nothing about this provision of the Act, or anything else in the Act, indicates that a party to a district-court proceeding under the Act must challenge all of a district court's confirmation decision, as opposed to just some of it, in order to file an appeal. The Act, it is true, directly authorizes appeals from district-court orders that "modify[]" arbitration awards, 9 U.S.C. § 16(a)(1)(E), and yet does not directly say that an unsuccessful party may appeal an "unmodified" award or a "denied modification request." But this is of no moment because an "unmodified" award frequently

will become a "confirm[ed]" award, as indeed happened here. Jurisdiction exists to review the district court's decision.

III.

In attempting to vacate or modify an arbitration award governed by the Federal Arbitration Act, a disappointed party must look to sections 10 and 11 of Title 9, which "provide [the] exclusive regime[] for the review provided by the [Federal Arbitration Act]." *Hall St. Assocs. v. Mattel, Inc.*, __ U.S. __, 128 S. Ct. 1396, 1406 (2008). Section 10 enumerates several grounds for vacating an award, while section 11 does the same for modifying an award. As the arbitration winners, Grain and Barnes, unsurprisingly, do not seek to vacate the award under § 10. They instead wish to modify the award—in truth, to double it—and thus rely on § 11, which provides the following grounds for modifying an arbitration award:

> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11.

A.

Grain and Barnes claim that the award must be modified because there was "an evident material miscalculation of figures." 9 U.S.C. § 11(a). But because they failed to raise this argument in the district court, they have forfeited the argument on appeal. *See Enertech Elec., Inc. v. Mahoning County Comm'rs*, 85 F.3d 257, 261 (6th Cir. 1996). The argument, at any rate, has nothing to recommend it. By its terms, "an evident . . . miscalculation of figures" concerns a computational error in determining the total amount of an award—what the Fourth Circuit calls a "mathematical error appear[ing] on the face of the award." *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 194 (4th Cir. 1998); *see also Capital Wholesale Elec., Inc. v. McCarthy Constr.*, No. 93-16578, 1995 WL 105987, at *2 (9th Cir. Mar. 9, 1995) (requiring an "evident *mathematical* miscalculation") (emphasis added); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) (finding a material miscalculation when an arbitrator mistakenly awarded the same damages twice in the same award). No such error appears on the face of the award, and Grain and Barnes have not pointed to any such error. Instead of complaining that the arbitrators made an obvious numerical gaffe in computing the total award, Grain and Barnes argue that the arbitrators made a mistake on the merits when they refereed a dispute between the parties over the appropriate start and stop dates for calculating the interest award. Whatever else such an alleged error may be, it is not "an evident material miscalculation of figures."

B.

Grain and Barnes face a similar problem in contending that the award was "imperfect in matter of form not affecting the merits of the controversy," 9 U.S.C. § 11(c), on the theory that it did not include a sufficient amount of attorneys' fees. Here, too, we have a complaint about a merits dispute, and here, too, we have a provision that deals with a process-driven problem. An award that is "imperfect in matter of form," as these terms suggest, is one that suffers from a scrivener's error or that otherwise does not deliver on the arbitrator's stated purpose in granting relief. *See Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1284 (5th Cir. 1994); *see also Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003) (describing the type of errors affected by this subsection as "technical error[s]"); *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (2d Cir. 1980) (holding that district court had no power to revise arbitration award amount for violating public policy because "Section 11(c) . . . does not license the district court to substitute its judgment for that of the arbitrators"); *cf. Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 15 (D. Mass. 2002) (modifying an award when the arbitrators' written decision did not reflect the award they orally announced due to a "simple mistake" in the completion of a form).

Grain and Barnes cite no case—and we can locate none—in which the outcome of an arbitrator's reasoned decision regarding the appropriate amount of an attorneys' fees award is viewed as a "matter of form." The one case on which they rely in this portion of their argument cuts against them. It held that an

award of attorneys' fees was "*not* imperfect in matter of form with respect to the adjudication of attorney's fees [because] [t]he issue of attorney's fees was presented to the arbitrator, and he made a clear determination of the parties' rights to attorney's fees under [the arbitration agreement]." *Mantaline Corp. v. PPG Indus., Inc.*, No. 2:02CV269, 2006 WL 297263, at *5 (W.D. Pa. Feb. 7, 2006) (emphasis added) (internal quotation marks omitted). Exactly. Because Grain and Barnes have not shown that this aspect of the award was inconsistent with the arbitrators' merits ruling on attorneys' fees, § 11(c) provides no basis for relief.

C.

Grain and Barnes principally argue that their award should be doubled, not because it implicates one of the enumerated grounds for modifying an award, but because it turned on a "manifest disregard of the law." This theory, however, appears nowhere in § 11, and the Supreme Court has recently explained that the enumerated grounds in §§ 10 and 11 provide the "exclusive" grounds for obtaining relief from an arbitration decision. *Hall St.*, 128 S. Ct. at 1406. To the extent that "manifest disregard" is "shorthand" for the grounds enumerated in § 11, as the Supreme Court suggested might be the case for some of the grounds listed in § 10, *id.* at 1404, that does Grain and Barnes no good. As we have shown, the enumerated grounds upon which they rely simply do not apply to their merits-based complaints about the award.

It is true that we have said that "manifest disregard of the law" may supply a basis for *vacating* an award, at times suggesting that such review is a

"judicially created" supplement to the enumerated forms of FAA relief. *See, e.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995). *Hall Street*'s reference to the "exclusive" statutory grounds for obtaining relief casts some doubt on the continuing vitality of that theory. But, either way, we have used the "manifest disregard" standard only to vacate arbitration awards, not to modify them. As we held in *NCR Corp. v. Sac-Co, Inc.*, "[a] court's power to *modify* an arbitration award is confined to the grounds specified in [FAA] § 11," 43 F.3d 1076, 1080 (6th Cir. 1995), which do not include "manifest disregard of law." *See* Thomas H. Oehmke, *Commercial Arbitration* § 132:1 (2008); *cf. Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509–11 (2001) (noting that, in the labor-arbitration context, neither procedural misconduct nor irrational findings by an arbitrator will justify a court's reformation of the arbitration of the award because the appropriate remedy in both situations is to remand the case for further arbitration).

Grain and Barnes claim that we have repudiated the holding of *NCR*, but that is an overstatement. The two cited cases deal only with a court's power to vacate awards based on the "manifest disregard" standard, and neither one contains even a kernel of dicta supporting this theory. *See Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); *Jaros*, 70 F.3d at 421. Other cases, it is true, do contain dicta suggesting that a reviewing court may vacate *or modify* an arbitration award based on manifest disregard. But nothing turned on these casual remarks. In two cases, we noted in passing that an award may be modified based on manifest disregard, despite the fact that the parties were seeking only vacatur, not modification. *See Elec.*

Data Sys. Corp. v. Donelson, 473 F.3d 684, 686, 691 (6th Cir. 2007); *Buchignani v. Vining-Sparks IBG*, No. 98-6692, 2000 WL 263344, at *1–2 (6th Cir. 2000). Another case made a similar comment, without indicating that modification had been sought below and without concluding that modification was warranted. *See Legair v. Circuit City Stores, Inc.*, 213 F. App'x 436, 439 (6th Cir. 2007). By contrast, the vast majority of our decisions applying the manifest-disregard standard do so only to determine whether vacatur is an appropriate remedy. *See, e.g.*, *Coffee Beanery, Ltd. v. WW, L.L.C.*, No. 07-1830, 2008 WL 4899478, at *3 (6th Cir. Nov. 14, 2008); *Donelson*, 473 F.3d at 686, 691; *Jaros*, 70 F.3d at 421; *Anaconda Co. v. Dist. Lodge No. 27, Int'l Ass'n of Machinists*, 693 F.2d 35, 37–38 (6th Cir. 1982). *NCR* remains the law of this circuit and prohibits modifying an award based on an alleged "manifest disregard" of law.

IV.

For these reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-72486

[Filed February 14, 2008]

PETER G. GRAIN, M.D. and ANNETTE BARNES, M.D.,	)
Plaintiffs,	)
v.	)
TRINITY HEALTH, MERCY HEALTH SERVICES, INC. d/b/a MERCY HOSPITAL - PORT HURON, MARY TRIMMER, JERE BALDWIN, M.D., BERNARD VELARDO, M.D., and MAHMOUD CHAFTE, M.D.,	)
Defendants.	)

Honorable Patrick J. Duggan

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR (i) CONFIRMATION OF ARBITRATION AWARD AND (ii)

ADJUSTMENT OF AWARD OF ATTORNEYS' FEES AND COSTS AND INTEREST

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on February 14, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Plaintiffs Peter Grain, M.D. ("Dr. Grain") and Annette Barnes, M.D. ("Dr. Barnes") filed a sixteen-count complaint against Defendants on June 26, 2003. Defendants thereafter filed a motion to compel arbitration with respect to some, but not all, of Plaintiff's claims. On August 11, 2004, this Court granted Defendants' motion and stayed Plaintiffs' remaining claims pending arbitration. On December 12, 2007, an arbitration panel entered an award in favor of Dr. Grain on his breach of contract claim against Defendants Mercy Hospital Port-Huron ("Mercy Hospital"), Trinity Health ("Trinity"), and Mary Trimmer ("Ms. Trimmer"). In the arbitration award, the panel awarded Dr. Grain damages on his breach of contract claim in the sum of $518,625, attorneys' fees of $1,145,294.35, and costs of $490,476.20, less Defendants' attorneys' fees and costs of $512,525.11, for a net award of $1,635,770.55 plus interest from October 28, 2004. The arbitration panel entered judgment in favor of Defendants and against Dr. Grain and Dr. Barnes on the remaining claims arbitrated.

Presently before the Court is Plaintiffs' motion for (i) confirmation of the arbitration award and (ii) adjustment of award of attorneys' fees and costs and

interest, filed December 22, 2007. Defendants filed a response on January 22, 2008, in which they support confirmation of the arbitration award but oppose Plaintiffs' motion to modify. On February 12, 2007, this Court issued a notice to inform the parties that it is dispensing with oral argument with respect to Plaintiffs' motion pursuant to Eastern District of Michigan Local Rule 7.1(e)(2).

In their motion, Plaintiffs contend that the arbitration panel exceeded its authority and erred as a matter of law in calculating Dr. Grain's award of attorneys' fees, costs and interest. Specifically, Plaintiffs claim that the arbitration panel improperly (i) awarded Dr. Grain "reasonable" attorneys' fees rather than the "actual" fees he incurred; (ii) concluded that Dr. Grain only prevailed with respect to 75% of his case and therefore was entitled to only 75% of his fees and costs and was obligated to pay 25% of Defendants' fees and costs; (iii) excluded fees and costs incurred prior to August 11, 2004; and (iv) awarded interest from only October 10, 2004 (the date Defendants' filed the arbitration claim) rather than the date of the breach or when Plaintiffs' complaint was filed and only on the damage award. In response, Defendants argue that Plaintiffs fail to meet the requirements of the Federal Arbitration Act for modifying an arbitration award, 9 U.S.C. § 11. Alternatively, Defendants argue that the arbitration panel's award of attorneys' fees, costs and interest was correct.

The Sixth Circuit Court of Appeals has made clear that a request to vacate an arbitration award "in part" "is synonymous with modifying an award." *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995).

The court also made clear that a request to modify an arbitration award is governed by 9 U.S.C. § 11, as opposed to 9 U.S.C. § 10 which only governs a court's power to *vacate* an award. As the Sixth Circuit stated: "A court's power to *modify* an arbitration award is confined to the grounds specified in [Section] 11." *Id.*

Section 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration–
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. Plaintiffs fail to demonstrate that any of the reasons set forth in Section 11 are present in the

current matter to grant the Court the power to make the requested modifications.[1]

Plaintiffs do not identify a miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award. Further, there can be no dispute that the issue of attorneys' fees, costs, and interest was submitted to the arbitration panel. The amount of Dr. Grain' award is a matter affecting the merits of the arbitration panel's decision. *See NCR Corp.*, 43 F.3d at 1081 (indicating that an increase in the amount of the arbitration award is "clearly a modification that would affect 'the merits of the controversy.'") Finally, it is evident from the arbitration award that a modification is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain.

While Plaintiffs argue that a modification is warranted as a result of the arbitration panel's alleged errors of law, as the cases cited in Plaintiffs' motion indicate, the Michigan courts and the Sixth Circuit have identified the arbitration panel's "manifest disregard of the law" only as a basis for *vacating* an arbitration award. (Pls.' Mot. at 4-5, citing *Guardian Alarm Co. of Mich v. Richard T.* May, No. 269901, 2007 WL 4245411, at *3 (Mich. Ct. App. Dec. 4, 2007) (unpublished op.); *DAIIE v. Gavin*, 416 Mich. 407, 434, 331 N.W.2d 418 (1982); *Electronic Data Systems, Inc. v. Donelson*, 473 F.3d 684, 688 (6th Cir. 2007)). As the Michigan Supreme Court stated in *DAIIE*: "Where it

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[1] Notably, Plaintiffs have not responded to Defendants' argument that Section 11 governs and that Plaintiffs fail to set forth a reason under that section for the Court to modify the award.

clearly appears on the face of the award or for the reasons for the decision as stated, being substantially a part of the award, that the arbitrators through an error in law have been led to a wrong conclusion, and that, but for such error, a substantially different award must have been made, the award and decision *will be set aside*." 416 Mich. at 434, 331 N.W.2d at 443 (emphasis added); *see also Electronic Data Sys., Inc.*, 473 F.3d at 688 ("In addition [to the reasons set forth in 9 U.S.C. § 10], a reviewing court may *vacate* an award where the arbitrators have manifestly disregarded the law.") The Court is unaware of any case and Plaintiffs fail to identify a case where the arbitration panel's manifest disregard of the law affords a court the power to modify an arbitration award.

Accordingly,

IT IS ORDERED, that Plaintiffs' motion for confirmation of arbitration award is **GRANTED**, but Plaintiffs' motion for adjustment of award of attorneys' fees and costs and interest is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:
Elmer L. Roller, Esq.
Richard J. Seryak, Esq.
Russell F. Ethridge, Esq.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 03-72486

[Filed April 11, 2008]

PETER G. GRAIN, M.D. and ANNETTE BARNES, M.D.,	)
Plaintiffs,	)
v.	)
TRINITY HEALTH, MERCY HEALTH SERVICES, INC. d/b/a MERCY HOSPITAL - PORT HURON, MARY TRIMMER, JERE BALDWIN, M.D., BERNARD VELARDO, M.D., and MAHMOUD CHAFTE, M.D.,	)
Defendants.	)

Honorable Patrick J. Duggan

OPINION AND ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S ORDER DATED FEBRUARY 14, 2008

At a session of said Court, held in the U.S. District Courthouse, Eastern District of Michigan, on April 11, 2008.

PRESENT: THE HONORABLE PATRICK J. DUGGAN U.S. DISTRICT COURT JUDGE

Plaintiffs Peter Grain, M.D. ("Dr. Grain") and Annette Barnes, M.D. ("Dr. Barnes") (collectively "Plaintiffs") filed a sixteen-count complaint against Defendants on June 26, 2003. Defendants thereafter filed a motion to compel arbitration with respect to some, but not all, of Plaintiff's claim. On August 11, 2004, this Court granted Defendants' motion and stayed Plaintiffs' remaining claims pending arbitration. On December 12, 2007, an arbitration panel entered an arbitration award in which it *inter alia* granted Dr. Grain damages on his breach of contract claim, attorneys' fees, costs, and interest.[1] Plaintiffs thereafter filed a motion for (i) confirmation of the arbitration award and (ii) adjustment of the panel's award of attorneys' fees, costs, and interest. On February 14, 2008, this Court issued an opinion and order granting Plaintiffs' request to confirm the arbitration award and denying Plaintiffs' request to modify the attorneys' fees, costs, and interest awarded.

Presently before the Court is Plaintiffs' motion for reconsideration of the Court's opinion and order, filed February 29, 2008. The Court issued a notice on March 4, 2008, informing the parties that it would

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[1] The Arbitration Panel entered judgment in favor of Defendants and against Dr. Grain and Dr. Barnes on the remaining claims arbitrated.

permit Defendants to submit a response to Plaintiffs' motion, if they wished to respond. Defendants filed a response on March 14, 2008. Now, having considered the parties' pleadings, the Court denies Plaintiffs' motion.

Standard for Reconsideration

Eastern District of Michigan Local Rule 7.1(g) provides that a motion for reconsideration only should be granted if the movant demonstrates that the court and the parties have been misled by a palpable defect and that a different disposition of the case must result from a correction of such a palpable defect. E.D. Mich. LR 7.1(g). A motion that merely presents the same issues already ruled upon by the court shall not be granted. *Id.* Similarly, a motion to alter or amend the judgment pursuant to Rule 59(e) may be granted if there is a clear error of law, *see Sault Ste. Marie Tribe of Chippewa Indians v. Engler*, 146 F.3d 367, 374 (6th Cir. 1998), newly discovered evidence, *see id.*, an intervening change in controlling law, *Collison v. Int'l Chem. Workers Union, Local 217*, 34 F.3d 233, 236 (4th Cir.1994); *Hayes v. Douglas Dynamics, Inc.*, 8 F.3d 88, 90-91 n. 3 (1st Cir.1993); *School District No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993), or to prevent manifest injustice. *Davis v. Jellico Cmty. Hosp., Inc.*, 912 F.2d 129, 133 (6th Cir. 1990). A motion brought pursuant to Rule 59(e) or Local Rule 7.1(g) must be filed no later than 10 days after entry of the judgment or Order. FED. R. CIV. P. 59(e); E.D. Mich. LR 7.1(g)(1).

Analysis

In their previous motion for adjustment of the arbitration panel's award of attorneys' fees, costs, and interest, Plaintiffs contended that the panel exceeded its authority and erred as a matter of law in calculating those aspects of the award. In the opinion and order dated February 14, 2008, this Court held that its power to modify the arbitration award was confined to the grounds specified in 9 U.S.C. § 11 and that those grounds did not include the errors Plaintiffs asserted. (2/14/08 Op. and Order at 3, 5.) The Court further held that Plaintiffs failed to demonstrate that any of the reasons set forth in § 11 applied in the present matter to grant the Court the power to make the requested modifications. (*Id.* at 4.)

9 U.S.C. § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11. In concluding that none of the reasons set forth in § 11 were present in the current matter to grant the Court power to modify the arbitration award as Plaintiffs requested, this Court reasoned:

> Plaintiffs do not identify a miscalculation of figures or mistake in the description of any person, thing, or property referred to in the award. Further, there can be no dispute that the issue of attorneys' fees, costs, and interest was submitted to the arbitration panel. The amount of Dr. Grain's award is a matter affecting the merits of the arbitration panel's decision. . . . Finally, it is evident from the arbitration award that a modification is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain.

(2/14/08 Op. and Order at 4.) Plaintiffs now contend that the Court committed two errors in reaching this conclusion.

First, Plaintiffs contend that this Court erred in finding that the arbitration panel's manifest disregard of the law is not a ground for modification of an arbitration award. In support of this contention, Plaintiffs cite a number of federal circuit and district

court cases. (Pls.' Br. in Supp. of Mot. at 5.) Second, Plaintiffs argue that the Court erred in concluding that 9 U.S.C. § 11(c) does not provide a basis for modifying the award. Plaintiffs argue that the Court incorrectly concluded that this subsection is inapplicable because a decision relating to the award of attorneys' fees and costs "affect[s] the merits of the controversy."

With respect to Plaintiffs' first argument, the Sixth Circuit Court of Appeals has made clear that "[a] court's power to *modify* an arbitration award *is confined to* the grounds specified in § 11." *NCR Corp. v. Sac-Co., Inc.*, 43 F.3d 1076, 1080 (6th Cir. 1995) (second emphasis added). To the extent the cases Plaintiffs cite hold otherwise, none of those cases are Sixth Circuit decisions. This Court is bound to follow Sixth Circuit precedent.[2]

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[2] In any event, the Court cannot conclude that the arbitrators manifestly disregarded the law when they limited Dr. Grain's award for attorneys' fees, costs, and interest. The "manifest disregard of the law" standard provides "a very narrow standard of review." *Elec. Data Sys. Corp. v. Donelson*, 473 F.3d 684, 691 (6th Cir. 2007) (citation omitted). "'An arbitration 'must fly in the face of established legal precedent' . . . to find manifest disregard of the law." *Id.* (quoting *Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995)). "If a court can find any line of argument that is legally plausible and supports the award then it must be confirmed. Only where no judge or group of judges could conceivably come to the same determination as the arbitrators must the award be set aside." *Jaros*, 70 F.3d at 421. The applicable legal principle that the arbitrator allegedly disregarded must be "clearly defined and not subject to reasonable debate" and the arbitrators must have "refused to heed that legal principle." *Id.*

With respect to Plaintiffs' second argument, the Court continues to believe that an increase in the amount of the arbitration panel's award is a modification "affecting the merits of the controversy." Even if the Court erred in this respect, however, § 11(c) does not provide a basis for modifying the award.

Section 11(c) applies "[w]here the award is imperfect in matter of *form*." 9 U.S.C. § 11(c) (emphasis added). While the Court was able to locate only a few cases where courts relied on this reason to modify an arbitration award, those cases and the plain language of § 11 indicate that the phrase "imperfect in matter of form" does not refer to allegedly inaccurate legal conclusions by the arbitrator. *See Atlantic Aviation, Inc. v. EBM Group, Inc.*, 11 F.3d 1276, 1282-84 (5th Cir. 1994) (allowing modification to include money owed to the plaintiff, which arbitrator clearly intended to award but which was omitted from written arbitration award); *Nationwide Mut. Ins. Co. v. First State Ins. Co.*, 213 F. Supp. 2d 10, 14-15 (D. Mass 2002) (modifying arbitration award where the amount of the award in the arbitrator's written award is inconsistent with what the panel said at the conclusion of the arbitration hearing); *Fischer v. CGA Computer Assoc.*, 612 F. Supp. 2d 1038, 1041-42 (S.D.N.Y. 1985) (concluding that the court was authorized to modify the arbitration award by substituting "DECLARES" for "FINDS," as the statements that followed clearly were the arbitrators' declarations of the parties' rights and duties and were in the nature of an award); *see also Mantaline Corp. v. PPG Indus., Inc.*, No. 2:02CV269, 2006 WL 297263, at *5 (W.D. Pa. 2006) (unpublished opinion) (finding that the arbitration panel's award of attorneys' fees and

costs for which there was no support in the record was not "imperfect in matter of form" where "[t]he issue of attorney's fees was presented to the arbitrator, and he made a clear determination of the parties' rights to attorney's fees . . ."). As the Second Circuit Court of Appeals has provided: "Section 11(c) . . . does not license the district court to substitute its judgment for that of the arbitrators." *Diapulse Corp. of Am. v. Carba, Ltd.*, 626 F.2d 1108, 1110 (1980). Because this in fact is exactly what Plaintiffs are asking the Court to do here, the Court concludes that § 11(c) does not provided a basis for modifying the arbitration award. This conclusion is further supported by the Court's belief that modification of the award is not necessary to effect the attorneys' fees, costs, and interest the arbitration panel intended to award Dr. Grain. 9 U.S.C. § 11 ("The order may modify and correct the award, so as to effect the intent thereof . . .").

For the above reasons, the Court concludes that it did not err in denying Plaintiffs' motion to modify the arbitration award.

Accordingly,

IT IS ORDERED, that Plaintiffs' motion for reconsideration of the Court's order dated February 14, 2008 is **DENIED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

Copies to:

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-1410

[Filed February 25, 2009]

PETER G. GRAIN, M.D., ET AL.,	)
	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
TRINITY HEALTH, ET AL.,	)
	)
Defendants-Appellees.	)
	)

BEFORE: ROGERS, SUTTON, and MCKEAGUE, Circuit Judges.

O R D E R

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk